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No. 10-1241

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IN THE

Supreme Court of the United States

DARRIN BLACK,

Petitioner,

v.

METRO, a political subdivision of the State of Oregon,

Respondent.

ROGER J. MIRACLE and ANN M. MIRACLE,

Petitioners,

v.

METRO, a political subdivision of the State of Oregon,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

BRIEF OF RESPONDENTS VIRGINIA LOUISE BLEEG, HAROLD S. MACLAUGHLAN AND REBECA MACLAUGHLAN IN SUPPORT OF PETITION

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INTRODUCTION

In *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 177 L.Ed.2d 184 (2010), the Supreme Court recognized the concept of judicial taking. The issue in that case was resolved in favor of the state because the Supreme Court of Florida did not render a decision that took a legal right plaintiffs had prior to the Florida Supreme Court' s *Stop the Beach Renourishment, Inc.* decision.

In *Stop the Beach* Justice Kennedy and Justice Sotomayor recognized a decision which worked an unpredictable result without a right of review can be a violation of the Due Process Clause. See concurring opinion of Justice Kennedy joined by Justice Sotomayor.

However, one must acknowledge a taking of Petitioners' judgments occurred in this case because the Oregon Court of Appeals created an unpredictable change of long standing law without notice and affording a opportunity of review.

> [t]o the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Hughes v. Washington, 389 U.S. 290, 296-97, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967)

In the instant case (*Bleeg*), the Oregon Court of Appeals did exactly that which the court recognized as prohibited. The Oregon Court of Appeals violated the taking clause when it ordered remand with instructions to vacate the judgment in *Bleeg* without affording petitioners a proceeding where the correctness of the judgment could be inquired into contrary to the long standing precedent in *Warner v. Myers*, 4 Or. 72, 77 (1871)

> "the correctness of its decision cannot be inquired into in this proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed and set aside by a competent tribunal, and in a proceeding where its correctness may be inquired into. . . . . The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unrevised."

Here, as in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Oregon Court of Appeals has engaged in the constitutionally repugnant pattern of "adopting novel procedures" to deny petitioners and other persons who file claims under Measure 37 (*former* ORS 197.352) full judicial review. The Oregon Court of Appeals has also engaged in the repugnant act of taking fundamental rights by "denying they ever existed" a constitutional abridgment identified by justice Stewart in his concurring opinion in

Hughes v. Washington, 389 U.S. 290, 297, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967)

The Oregon Court of Appeals violated the Due Process clause when it applied Measure 49 retroactively in spite of no evidence showing a legislative intent to support retroactive application.

The Oregon Court of Appeals further violated the Due Process clause when it misapplied the analysis of *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S. Ct. 1447 (U.S. Ky. 1995), which allows retroactive application only when there is *express* legislative intent of retroactivity and inequitable consequens do not result. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994); *Jideonwo v. Immigration and Naturalization Service*, 224 F.3d 692 (7th Cir. 2000)).

REASONS FOR GRANTING THE PETITION

I. If allowed to stand, this decision would enable Oregon's Judiciary to violate due process rights by vacating any disfavored judgment of a trial court without notice; an opportunity for review or a finding of error.

> The Due Process Clause protects against "unpredictable Change in State Law"

Hughes v. Washington, 389 U.S. 290 at 297.

> Oregon law has long provided "[A decision] must stand until reversed and set aside by a competent tribunal, and in a proceeding where its correctness may be inquired into.

See Warner v. Myers, 3 OR 218 (1870).

This decision if allowed to stand would eliminate the right to expect courts to follow the law in violation of the Due Process Clause.

II. The Oregon Court of Appeals lacked subject matter jurisdiction due to failure by Metro to preserve the issue at the trial court level.

"A litigant generally may raise a court's lack of subject matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576, 124 S. Ct. 1920, 1927, 158 L.Ed.2d 866 (U.S. 2004), *citing Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004).

The U.S. Supreme Court has determined appellate courts must adhere to procedural requirements in preserving a claim for appeal.

One such procedural requirement restricting the power and jurisdiction of a court of appeals pertains to preservation of issues. To preserve a claim for appeal, "the claim must have been raised at the earliest opportunity and preserved at each step of the judicial process." *State v. Stottlemyre*, 35 S.W.3d 854, 861 (Mo. App. 2001) (*quoting State v. Sumowski*, 794 S.W.2d 643, 647 (1990)).

In *Thomas v. Arn, infra*, the Supreme Court reviewed the Sixth Circuit's decision requiring that issues and objections must first be brought before the trial court in order to qualify for appellate review.

> The Sixth Circuit's decision to require the filing of objections is supported by sound considerations of judicial economy. The filing of objections to a [judge's] report enables the district judge to focus attention on those issues-factual and legal-that are at the heart of the

> parties' dispute.... The Sixth Circuit's rule, by precluding appellate review of any issue not contained in objections, prevents a litigant from "sandbagging" the district judge by failing to object and then appealing.

Thomas v. Arn, 474 U.S. 140, 146-148, 106 S. Ct. 466, 470-471 (U.S. Ohio, 1985).

This would force the court of appeals to consider claims that were never reviewed by the district court. Such a result would be an inefficient use of judicial resources. Further explanation of the reasoning behind the Supreme Court's opinion and support for the Sixth Circuit's judgment is found in *U.S. v. Schronce*: "Litigants would have no incentive to make objections at the trial level; in fact they might even be encouraged to bypass the district court entirely." *Ibid.*, 727 F.2d 91, 94 (C.A.N.C., 1984).

In the present matter, proper procedure to uphold the preservation requirement would dictate that a post-judgment motion first be brought before the trial court. Instead, Metro was allowed to file only a notice of appeal, which the Oregon Court of Appeals used to support its erroneous ruling of automatic mootness absent specific inquiry into this case. If Metro had concerns resulting from post-judgment changes in legislation, they should have submitted a post-judgment issue. But they did not. Instead, in a realization of the very fears expressed by the Supreme Court, Metro "sandbagged" the trial court and "bypassed" it entirely.

The proper standard of review for retroactive applications of law is correctness review, yet was simply unavailable to the Oregon Court of Appeals because

the trial court had never heard the issue. As such, the Court of Appeals had no right to review an issue that was not preserved below. Indeed, as implied by *Johnson v. Frederick and Lewis Timber and Equipment Co.*, 181 F.3d 101 (6th Cir. 1999), preservation is how the appellate court obtains jurisdiction, and, "if the district court lacked subject matter jurisdiction," the underlying judgment is void.

The Oregon Court of Appeals clearly violated the due process clause by holding a hearing ostensibly to review the trial court's decision but, instead of reviewing the record, treated petitioner's cause of action *void ab initio* and issued a vacatur — leaving petitioners with nothing. Hold Metro followed the proper procedure, the trial court would have had the opportunity to rule on the matter, and petitioners would have been able to be heard on whether Measure 49 was being unconstitutionally applied to extinguish their claims.

> The very nature of an appeal is to challenge perceived errors in a lower court's rulings. To permit a party to circumvent proper procedures for review in this manner would . . . cast asunder congressionally-enacted procedures for review.

In re Motors Liquidation Co., 428 B.R. 43, 63 (S.D.N.Y. 2010).

III. The treatment of petitioners and all Measure 37 claimants at the hands of the Oregon Court of Appeals is repugnant to the U.S. Constitution.

The due process protections of the 5th and 14th Amendments are protections categorically against state action. Those protections are not simply limited to executive or legislative actions. The U.S. Constitution, as interpreted and applied by the federal courts, is a protection against all forms of state action, including those undertaken in its judiciary. Supreme Court jurisprudence has specifically identified judicial taking as a form of taking that is equally prohibited by the 5th Amendment. (*See Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 177 L.Ed.2d 184 (2010).)

Accordingly, this Court, while giving appropriate consideration to the opinions of the state's judicial department, should keep in mind that the state courts may be a contributing party to the ultimate taking at issue.

The seminal case in the Oregon Supreme Court regarding this Measure 37 - Measure 49 conflict relied on by the Oregon Court of Appeals in *Bleeg* is illustrative. In *Corey v. DLCD*, 344 Or. 457 (2008), the plaintiff Corey objected to a proposed finding of the Court upon federal Constitutional grounds which were preserved, but the Oregon Supreme Court declined to consider the constitutionality of its proposed ruling, finding that the constitutionality of its own action was not an issue properly before the Court. This conclusion would seem to raise issues of whether the U.S. Constitution is the supreme law of the land.

The recent decisions of the Oregon Court of Appeals and its treatment of issues raise serious questions. The decision in this case is the result of a pattern of the Oregon Court of Appeals failing to follow maxims of law. In this and some other related cases, the Oregon Court of Appeals has engaged in systematic adoption of positions exactly contrary to earlier decisions without addressing the incongruity and conflict thereby created. In some cases, there is a blatant avoidance of issues. In *all* cases, the effect, regardless of means, is to protect and preserve the state's taking without compensating. This case illustrates the Oregon Court of Appeals' pattern of ignoring any precedential law that happens to be contrary. In *Warner v. Myers*, 3 Or. 218 (1870), the opinion of the Circuit Court was, "When a tribunal or board, no matter how inferior its jurisdiction, or limited its power, proceeds within its jurisdiction and determines a matter which it is authorized by law to decide, its decision, even if erroneous, is binding until it is reversed." (*Id.* at 224.). In affirming the decision on appeal in *Warner v. Myers*, 4 Or. 72, 77 (1871), the Court said,

> "It was the duty of that board to decide the question in the first instance, and the correctness of its decision cannot be inquired into in this proceeding. Its decision, although erroneous in point of law or fact, must stand until reversed and set aside by a competent tribunal, and in a proceeding where its correctness may be inquired into..... The fact that an appeal has been taken does not affect the conclusive nature of the decision while it remains unrevised."

The courts of Oregon with their wholesale application of the new found mootness doctrine are ignoring the due process obligation to adhere to the settled maxims of law which is the bedrock of *stare decisis.*[11]

This case stands as another excellent example of the Court of Appeals going outside the confines of due process by ignoring the settled maxims of law bound up in the doctrine of *stare decisis* and fabricating a rationale to justify an end.

IV. The Bleeg decision repugnant to the equal protection clause

Under the equal protection clause, in the absence of heightened review of a fundamental right, the standard is whether the alleged discrimination rationally furthers a legitimate state purpose. As in the present proceeding, the very important and significant question is whether property, particularly in the form of a valid judgment for compensation, involves a fundamental right. The Petitioners humbly ask this Court to examine the way the Oregon Court of Appeals has, by its decision here

---

1. The line of cases consistently prohibiting the retrospective cancellation of validated and accrued claims for compensation, be they statutory claims, contracts or judgments, has a lineage exceeding 200 years. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Fletcher v. Peck*, 3 U.S. 162 (1810); *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. 805 (1864); *Pritchart Ex'x v. Norton*, 106 U.S. 124 (1882); *Ettor v. City of Tacoma*, 228 U.S. 148 (1913); *Graham v. Goodcell*, 282 U.S. 409 (1931); *Coombes v. Getz*, 285 U.S. 434 (1932); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); and *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

created a contradiction with earlier precedent in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) and *American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

V. The Oregon Court of Appeals violated the due process clause when it applied Measure 49 retroactively to eliminate petitioners' causes of action.

Measure 49, amended, *but did not repeal, former* ORS 197.352 (Ballot Measure 37 (2004), renumbered as ORS 195.305 by Measure 49; hereinafter "ORS 197.352"). The "cause of action" was not eliminated anywhere in Measure 49, including Section 5, which applies to "claims," and the disparate meanings for a "claim" and a "cause of action" were not considered by the Court of Appeals.

The cause of action for compensation under ORS 197.352(6) continues to be available as supported by the text of Measure 49, which merely amended Measure 37. Petitioners argued at both the trial court and appellate court level that Measure 49 has no effect on a "cause of action" for compensation that concluded with entry of a judgment prior to the effective date of Measure 49, and that their cases remain justiciable.

The Court of Appeals, however, avoided any statutory interpretation, ignoring the methodology for statutory construction set forth by *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610, 859 P.2d 1143 (1993), ORS 174.020 and this Court's recent decision in *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009). Specifically, the Court of Appeals summarily held that the petitioners' cases were

not justiciable because the "ongoing dispute" involved "Measure 37 claims for just compensation" and because "Measure 49 supersedes those Measure 37 claims and deprives trial court's judgments in this case of continuing viability."

The Court mischaracterized the holding in *Corey, supra*, by extending the interpretation of Measure 49's effect on Measure 37 claims to include extinguishment of judgments and "causes of action" for compensation under ORS 197.352(6). The Court of Appeals reached that conclusion without applying any of the well-established principles of statutory interpretation.

In holding that "Measure 49 by its terms deprives Measure 37 waivers — and all orders disposing of Measure 37 claims — of any continued viability . . .", *Corey, supra*, at 466-67, the Court of Appeals limited its interpretation to Measure 49's effect on "claims." the language in Section 5 of Measure 49 as follows:

"A claimant that filed a claim under ORS 197.352 [Ballot Measure 37 (2004)] on or before that date or adjournment sine die of the 2007 regular session of the Seventy-fourth Assembly is entitled to just compensation as provided in..."

Id. at 463.

This Court's holding in *Corey, supra*, was erroneously expanded by the Court of Appeals to include judgments entered upon causes of action, which are at issue here. That interpretation is wholly unsupported by the text of Measure 49.

It is repugnant to the Constitution to apply Measure 49 retroactively.

The Court of Appeals also failed to address the continued viability of ORS 197.352 until Measure 49 became effective and specifically whether any changes to Measure 37 causes of actions were prospective rather than retroactive. In multiple sections, Measure 49 plainly provides for the ongoing viability and availability of the cause of action for compensation under subsection (6) of ORS 197.352 "as immediately in effect before the effective date of [Measure 49]." For example, Measure 49 (codified at ORS 195.305 Section 11(8)) specifically provides that when relief has been claimed under sections 5 to 11 [of Measure 49]:

> (a) Additional relief is not due; and
>
> (b) An additional claim may not be filed, compensation is not due and a waiver may not be issued with regard to the property under [Measure 37] as in effect immediately before December 6, 2007 [the effective date of Measure 49] . . .

This plain language provides that when relief is not claimed under Measure 49, compensation is still due under Measure 37.

What the voters voted on in Measure 37 was not repealed, only prospectively amended. "[A] repeal of an element of a civil cause of action may not be done through innuendo, but may be done only through explicit legislation." *Brown v. Vogt*, 272 Or. 482, 483-95, 538 P.2d 362 (1975).

Further support for the determination that Measure 49's elimination of the "cause of action" in ORS 197.352(6) is only prospective is found in section 4 of Measure 49.

"[A] party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it," *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009), as the courts ordinarily presume that the legislature intended terms to have their plain, natural, and ordinary meanings.

In this case, the Court of Appeals failed to do any analysis to determine if Measure 49 expressed an intent to abolish causes of action, including the required analysis set forth in *State v. Lanig*, 154 Or. App. 665, 963 P.2d 58 (1998), which states that there must be a rational basis or means in support of abolishing the causes of action retroactively. Conspicuously absent is any language retroactively applying the amendments in ORS 197.352 to repeal a pre-existing "cause of action."

"Unless the legislature expressly provides that a statute applies retroactively, the general rule is that the rights and liabilities of a person who is affected by an event are defined and measured by the statutes in effect at the time of the event." *Barnes v. City of Portland*, 120 Or. App. 24, 852 P.2d 265, *Petition for Review Denied* 317 Or. 583 (1993), *citing Whipple v. Howser*, 291 Or. 475, 632 P.2d 782 (1981). The judgments on appeal, then, should be reviewed based on the law in effect at the time they were entered (*former* ORS 197.352) and not on Measure 49. "In the face of competing constructions of an enactment, we generally are required to "choose the interpretation which will avoid any **serious** constitutional difficulties." *Lanig, supra*, 154 Or. at 674 (*citing State v. Duggan*, 290

Or. 369, 373, 622 P.2d 316 (1981)); *see also State v. Meyers*, 153 Or. App. 551, 560, 958 P.2d 187 (1998).

Furthermore, insertion of a provision to abolish judgment entered pursuant to Measure 37 cause of action is considered judicial legislation and would amount to a judicial amendment of the statute ex post facto. *See Caldwell v. Wunderlich*, 26 Or. App. 407, 552 P.2d 1321 (1976) (*citing State v. LaFollett*, 132 Or. 257, 284 P.283 (1930)).

In Measure 49, there is no express intent to abolish a cause of action and no expressed intent to stripping petitioners of all relief.

Petitioners' judgments should remain justiciable and be reviewed, on appeal, under the law in effect at the time they were entered.

A. Retroactive application of Measure 49 constitutes a violation of the due process clause.

A judgment cannot be taken away by legislation except under specific circumstances. *See Newsom v. Greenwood*, 4 Or. 119, 121-122, 1871 WL 1122 (1871); *Thomas v. City of Portland*, 40 Or. 50, 52 66 P 439 (1901); *Fisk v. Leith et al.*, 137 Or. 459, 299 P 1013 (1931); *Hall v. Northwest Outward Bound School, Inc.*, 280 Or. 655, 572 P.2d 1007 (1977); *Barnes v. City of Portland*, 120 Or. App. 24, 852 P2d 265 (1993); *Ettor v. City of Tacoma*, 228 U.S. 148, 33 S. Ct. 428 (1913); *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994); *Luxford v. Dalkon Shield Claimant's Trust*, 978 F.Supp. 221, 1997 U.S. Lexis 15874 (1997).

The right to damages in *Ettor* closely parallels the petitioners' causes of action. The remedy given was for damages resulting from the city or government's action. It was an extraordinary remedy. Measure 37, acknowledging that the enforcement of certain restrictions could result in damages, gave the landowners a remedy for damages if Metro did not waive their regulations. The court's opinion in *Hall* affirmed the validity of *Ettor*. This issue was not addressed by the Oregon Court of Appeals and must be addressed by this Court if it is found that Measure 49 abolished causes of action under Measure 37.

B. Vacating the judgment violated the takings clause.

> UNITED STATES CONST. AMEND. V states, in pertinent part:
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In *Stop the Beach,* this Court further supported the takings clause, stating:

> [T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing.

Ibid., 130 S. Ct. 2592, 2601.

This Court continued on to identify various

circumstances where it had found there has been a taking. Here, like in *Webb's Fabulous Pharmacies, Inc. v. Beckman*, 449 U.S. 155, 163-165, 101 S. Ct. 446, 66 L.Ed.2d 358 (1980), there has been a recharacterization as public property of what was previously private property. Here, petitioners' private property — their money judgments against Metro — were taken by judicial action and handed back to Metro by relieving it of its financial obligation.

VI. Assuming *arguendo* that there was an intent by the legislature and the voters to apply Measure 49 retroactively, it would still be repugnant to the constitution to use mootness to justify ordering vacatur under these facts.

> UNITED STATES CONST. AMEND. XIV §1 states, in pertinent part:
>
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, this Court opined:

> Litigants, we have long recognized, "[a]re entitled to have [their] case tried upon the assumption that ... facts, stipulated into the record, were established." *H. Hackfeld & Co. v. United States*, 197 U.S. 442, 447, 25 S. Ct. 456, 49 L.Ed. 826 (1905). This entitlement is the bookend to a party's undertaking to be

bound by the factual stipulations it submits. See *post*, at 3005 (ALITO, J. dissenting)(agreeing that "the parties must be held to their Joint Stipulation"). As a leading legal reference summarizes:

> "[Factual stipulations are] binding and conclusive ..., and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated, ... or to maintain a contention contrary to the agreed statement, ... or to suggest, on appeal, that the facts were other than as stipulated or that any material fact was omitted. The burden is on the party seeking to recover to show his or her right from the facts actually stated." 83 C.J.S. Stipulations § 93 (2000)(footnotes omitted).

This Court has accordingly refused to consider a party's argument that contradicted a joint "stipulation [entered] at the outset of th[e] litigation." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 120 S. Ct. 1346, 146 L.Ed.2d 193 (2000). ...[F]actual stipulations are "formal concessions ... that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Thus, a judicial admission ... is conclusive in the case." 2 K. Broun McCormick on Evidence § 254, p. 181 (6th ed. 2006)(footnote omitted).. See also, *e.g.*, *Oscanyan v. Arms Co.*,

> 103 U.S. 261, 263, 26 L.Ed. 539 (1881)("The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced.")

Ibid., 130 S. Ct. 2971, 2983, 177 L.Ed.2d 838 (2010). The 1st Circuit Court of Appeals has stated, "[a] stipulation as to facts also functions as a waiver of legal defenses to the establishment of the particular element to which the parties have stipulated, and therefore is not reviewable on appeal." *United States v. Silva*, 554 F.3d 13, 23-24 (1st Cir. 2009), *citing United States v. Meade*, 175 F.3d 215, 223 (1st Cir. 1999). Under 83 C.J.S. § 86, it states that submission of a matter on stipulated facts is akin to the parties requesting a directed verdict. This Court has held that "[a] party cannot complaint of a judgment or order entered in accordance with his request." *U.S. v. City of Memphis*, 97 U.S. 284, 1877 WL 18624 (U.S. 1877).

After more than 180 days had passed since the submission of their claims, petitioners individually commenced a cause of action for compensation in Clackmas County Circuit Court as provided for under ORS 197.352(6). These four cases were consolidated at the trial court. Subsequent to a stipulated facts trial, the trial court held that each of the petitioners had suffered a loss in fair market value as a result of Metro's land use regulations. A money judgment was entered for petitioners on December 5, 2007, prior to the December 6, 2007, effective date of Measure 49.

Thereafter, each petitioner owned property in the form of a money judgment reflecting the trial court's final determination.

The Oregon Court of Appeals applied reasoning similar to this Court's reasoning in *Plaut*, but did so through the Oregon Court of Appeals' case of *State ex. rel. English v. Multnomah County*, 227 Or. App. 419, 206 P.3d 224 (2009) ("English I"). In *English I*, the Oregon Court of Appeals analyzed its own prior cases of *Corey v. DLCD*, 344 Or. 457, 464, 184 P.3d 1109 (2008) and *Cyrus v. Board of County Com'rs of Deschutes County*, 226 Or. App. 1, 202 P.3d 274 (2009), specifically finding that Measure 49 was retroactive and applied "to *all* Measure 37 claims, successful or not, regardless of where they [were] in the Measure 37 process." *Cyrus* at 6, *quoting Corey* at 465 (emphasis in original). The court further stated ". . . Measure 49 by its terms deprives Measure 37 waivers —*all* orders disposing of Measure 37 claims — of any continuing viability." *Id.*, *quoting Corey* at 466-467 (emphasis in original). *English I* went on to explain the court's mootness determination in *Cyrus* as supported by the availability of litigation of their issues under Measure 49. However, in *English I* the matter was differentiated since the claim was considered "merged" into the judgment and thereby extinguished. *English I* at 428. This differentiation was found to not apply to the instant matter given the voluntary dismissal of that matter during the appellate process by the State of Oregon, resulting in a final determination of the judicial department. The Oregon Court of Appeals explained it as "English had a judgment that (1) adjudicated her Measure 37 claim for just compensation long before the effective date of Measure 49 and (2) was not subject to judicial revision." *Bleeg v. Metro*, 211 P.3d 302, 229 Or. App. 21 (2009), *citing English I* at 428.

While the Oregon Court of Appeals acknowledged that the appeal in *English I* arose from English's efforts to compel the county to satisfy the judgment

for compensation through mandamus proceedings, it ultimately distinguished it from the current matter. Here, since there was a valid stipulation to all facts — including those pertaining directly to whether a valid claim existed under Measure 37 — Metro was should have been limited to challenging claims to which the parties had not entered a stipulation. In *English*, the Oregon Court of Appeals echoed *Corey* and *Cyrus* by stating that "[w]hen the dispute involving a predicate Measure 37 claim for just compensation is ongoing (whether in another forum or on appeal), Measure 49 supersedes the Measure 37 claim and requires the parties to proceed under the new standards in Measure 49 to determine their rights." *English v. Multnomah County*, 229 Or. App. 15, 26, 209 P.3d 831 (Or. App. 2009), (hereafter "*English II*"). In the instant case, the Oregon Court of Appeals erroneously adopted an automatic reversal of the trial court judgments in any and all cases pertaining to Measure 37, regardless of individual circumstances such as in this case where there was a valid and binding stipulation between the parties and the entry of judgment on said stipulated facts, absent any review whatsoever of the merits of the appeal to determine whether affirmation was appropriate to render the trial court judgment final. An apparent violation of the Due Process Clause which requires clarification of the conflicting determinations from this Court under *Plaut* and *Martinez*.

The Oregon Court of Appeals adopted a procedure similar to *Plaut* by applying Measure 49 retroactively to moot petitioners' claims in violation of the Due Process Clause. Because the matter was still pending final determination by the judicial department and Respondent and Petitioners were bound and subject to a

binding stipulation of the parties before the trial Court, in accordance with this court's recent pronouncement in *Martinez*. The only exceptions to the binding effects of stipulations were not argued by Metro nor found by the Oregon Court of Appeals. That court simply erred by mooting an appeal that was directly contrary to the parties' stipulations.

The issue at hand in the trial court was by what method the petitioners' damages should be calculated. Under Metro's method, the claimed damages were zero, and the petitioners stipulated to that. In return, Metro stipulated to the damages under the petitioners' theory. The petitioners won the legal argument, which allowed them to be awarded their damages.

As this Court indicated in *Martinez*, petitioners herein were entitled to rely upon the binding nature of the stipulations of the parties before the trial court, and this is true even if the law changed. The application of a change of law retroactively under *Plaut* to defeat the stipulated facts of the parties would overturn this Court's long-standing precedent under *H. Hackfeld & Co.*, as acknowledged in *Martinez*. It is the petitioners' contention that *Plaut* did not authorize automatic reversals based on changes of law that may moot an inferior court's determination when applied retroactively, since doing so would not account for various circumstances that could exist, such as:

(1) stipulations between the parties as to all of the issues, preventing further judicial review of those stipulated facts and thereby binding the parties to such matter as a final determination of the judicial department; and

(2) circumstances where affirmance on appeal may resort back to the trial court's valid judgment date, predating the change of law at issue; and

(3) circumstances where the change of law overturns a trial court judgment, since no valid claim would remain, leaving the parties without remedy. Contrary to *United States v. Munsingwear, Inc.*, 340 U.S. 6 (1950) and its progeny.

Respondents entered into factual stipulations that bound Metro to facts which were not "reviewable on appeal," *Silva*, 554 F.3d 13 (1st Cir. 2009). The Oregon Court of Appeals violated the holding of *Silva* and petitioners' rights under the Due Process clause by not binding Metro to its factual stipulations. Metro's concession (its stipulation to the liability for compensation for a specified claim) should not be found moot by application of a retroactive change of law, but instead should be held to have been a waiver of its challenge.

VII. The Court should grant certiorari so it can make clear that applying a law retroactively such that it results in "manifest injustice" violates the Due Process clause.

Under *Plaut*, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply [that law] in reviewing judgments still on appeal [that were rendered before the law was enacted], and must alter the outcome accordingly." *Ibid.*, at 212; *see also Landgraf*, 511 U.S. *at* 273-280. This court should grant certiorari to support the 7th Circuit's acknowledgement of this Court's previous holding that applying a law retroactively such that it

results in "manifest injustice" violates the Due Process clause. *See Jideonwo v. I.N.S.*, 224 F.3d 692, 697 (7th Cir. 2000), *citing Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 716, 94 S. Ct. 2006, 40 L.Ed.2d 476 (1974). As the 7th Circuit explained, "[m]anifest injustice may occur where a new law changes existing rights or imposes unanticipated obligations on a party without providing appropriate notice." *Id.*; *see also Bradley*, 416 U.S. at 720; *see also Landgraf*, 511 U.S. at 266.

> Under *Eastern Enterprises v. Apfel*, this Court found that, "[r]etroactive legislation is generally disfavored . . . because it can deprive citizens of legitimate expectations and upset settled transactions." *Ibid.*, 524 U.S. 498, 501, 118 S. Ct. 2131, 2136 (U.S.Mass. 1998), *citing General Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 1112, 117 L.Ed.2d 328 (U.S. Mich. 1992).

In *Bradley*, this Court further indicated:

> We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Ibid. at 710-717.

The 9th Circuit has recently reiterated the *Bradley* test for retroactivity under *Oregon Natural Desert Ass'n v. Locke*, stating that "[t]he *Bradley* test for whether a newly

passed law should be given retroactive effect examines (1) whether the new law imposes new legal consequences for past conduct, (2) whether manifest injustice would occur by applying the new law, and (3) whether any contrary legislative history exists." *Ibid.*, 572 F.3d 610, 617 (9th Cir. 2009), *citing Bradley,* 416 U.S. at 711-12.

The Court of Appeals abridged the constitution by acting arbitrarily and capricious declaring Measure 49 applied retroactively without findings of fact or conclusions of law to support that declaration.

Petitioners were not placed on appropriate notice that the law affecting their rights under Measure 37 would be changing, nor that Measure 49's intent would be to deprive them altogether of any rights to just compensation for the restrictions placed upon their land by Metro's designation of their property as lying within the urban growth boundary. *See Jideonwo,* 224 F.3rd, 697. Petitioners maintained a legitimate expectation not only in the protections under Measure 37, but in Metro's concession and stipulation that the petitioners were entitled to just compensation therein, which petitioners considered a "settled transaction." *Apfel, supra.* Petitioners maintain no claim under the new Measure 49, unlike the claimants in *Corey* and *Cyrus*, upon which the Oregon Court of Appeals relied heavily in mooting the current matter. They have, in short, no remedy, and that is clearly a change in their existing rights. In fact, at the hearing before the Oregon Court of Appeals in this case, Richard Benner, counsel for respondent Metro said on the record that petitioners would have no rights under Measure 49. Again, such a dismissal represents a significant prejudice against petitioners and inequitable treatment at the hands of the Oregon Court of Appeals.

Thus, application of Measure 49 to moot the trial court judgment of just compensation to the petitioners in this matter evidences a "manifest injustice" requiring review by this Court. This Court should grant certiorari to address the application of the *Bradley* factors in this case and for all those similarly situated, who, like petitioners, maintained a legitimate confidence in stipulations and in the application of existing law.

VIII. The Court should grant certiorari to make clear using mootness to *sua sponte* grant vacatur when in equity results is repugnant to the U.S. Constitution.

In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and its prodigy the Supreme Court has held that where intervening mootness prevents appellate review of the underlying decision, the decision below should be vacated only where vacatur is equitable. Vacatur falls within the Court's discretion. That discretion is governed by the use of equitable authority:

> according to which courts dismiss appeals as "moot," "is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable."

In re Fontainebleau Las Vegas Holdings, LLC, 434 B.R.716, 741 (S.D.Fla., 2010), *quoting Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002).

The Oregon Court of Appeals ordered vacutur which resulted in manifest injustice — without ever assessing the merits of the case.

In *Munsingwear, Inc.*, and its progeny, this Court addressed circumstances in which a case becomes moot while it is pending review by a higher court. A court can only use mootness as a reason to overturn a case involving a change in law and order vacatur when a final judgment is still pending *if* there is finding that vacatur is equitable. Thus, the Oregon Court of Appeals should have assessed the merits of the appeal to determine if Metro **raised any meritorious issues, because** if it was determined that Metro's claims lacked merit, then the trial court judgment would be the final judgment of the judicial department, and the trial court judgment should be upheld. Accordingly, petitioners have judgments, protected from changes in legislative law.

The unjustified application of the mootness doctrine to this case shows that the Oregon Court of Appeals abdicated its responsibility to use its powers equitably. By (1) denying the constitutional right of just compensation under the existing law at the time the trial court determined the case, based on the parties' stipulations, (2) refusing to review the merits of the appeal, and (3) failing to require proper procedure under either the preservation rule or mootness doctrine, the Oregon Court of Appeals failed to meet its burden of rendering an equitable determination for petitioners.

IX. Due process of law relies on the courts' adherence to maxims of law.

A maxim of law is an established principle or proposition, and a principle of law universally admitted, as being just and consonant with reason. 1 Bl. Com. 68. Maxims are principles and authorities, and are part of the general customs or common law of the land.

In the present matter, petitioners invoke the due process of law as a constitutional right denied them by both the Oregon Supreme Court and the Oregon Court of Appeals. The constitutional guarantee of due process of law is, set forth in UNITED STATES CONST. AMEND. V, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Due process of law, as it relates to the maxims of law defined *supra*, is also defined in *Black's Law Dictionary* as follows:

> Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs . . .

> Aside from all else, "due process" means fundamental fairness and substantial justice. *Vaughn v. State, 3 Tenn.Crim.App. 54,* 456 S.W.2d 879, 883.

Ibid. at 500 (6th ed. 1990).

Due Process is a principle of law that limits the exercise of governmental powers. A guarantee that courts equitably exercise the power vested in them by the constitution and the trust of the people falls well within the right of due process; courts shall not be unreasonable, arbitrary or capricious. Consequently, it is unacceptable that the Oregon Court of Appeals has been permitted to not only violate the petitioners' right of due process, but to trespass the sacred responsibility to use their power judiciously.

CONCLUSION

The Oregon Court of Appeals, in spite of its earlier contrary conclusion in *Corey v. DLCD* has adopted the position that constitutional "vested property rights" are a thing of the past and that these "rights" no longer exist for purposes of constitutional protection. In doing so, the Oregon courts are unilaterally and without authority overruling U.S. Supreme Court opinion on the matter. Petitioner aver such an arbitrary rejection of established state law and U.S. Supreme Court jurisprudence is unconstitutional and renders the judicial department complicit in effecting the same sort of taking described in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592, 177 L.Ed.2d 184 (2010).

As set forth in the preceding arguments: The Oregon Court of Appeals exceeded their jurisdiction in reviewing Measure 49; misinterpreted the statutory meaning of Measure 49; applied Measure 49 retroactively without explicit legislative intent; unlawfully abolished petitioners' cause of action under Measure 37; unconstitutionally took petitioners' property rights; ignored prior stipulations that were legally binding; and vacated petitioners' judgments and deserted them without means to remedy damages.

It has been clearly shown that the Oregon Court of Appeals failed to exercise its powers or discharge its responsibilities according to the established maxims of law, and thereby violated petitioners' constitutional rights.

For the reasons set forth above, Virginia Bleeg, Harold S. Maclaughlan and Rebecca Maclaughlan

respectfully request that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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